

Kluwer Arbitration Blog

ICC To Name Sitting Arbitrators And Penalize Delay In Issuing Awards

Michael McIlwrath (MDisputes) · Wednesday, January 6th, 2016

The Court of Arbitration of the International Chamber of Commerce began the new year by announcing two interesting and even bold innovations.

The ICC Court will now, according to [the ICC's own press release](#), "publish on its website the names of the arbitrators sitting in ICC cases, their nationality, as well as whether the appointment was made by the Court or by the parties and which arbitrator is the tribunal chairperson."

In addition, the ICC announced that it will reduce the fees paid to arbitral tribunals that fail to submit a draft award within three months of the last substantive hearing or the last substantive post-hearing submission (two months in the case of a sole arbitrator).

Arbitrator Transparency

For arbitrations registered after January 1, 2016, the ICC will publish the information about the arbitrators once the tribunal is constituted. This information will remain on the ICC's website after the case is terminated. So far so good (in fact, very good).

Ben Giaretta, a practitioner in Singapore, aptly characterized this on an international arbitration listserv as "Arbitral Panel version 2.0", noting that, "unlike panels of arbitrators at some institutions where arbitrators' names are included but they are never appointed, this gives an accurate picture of who is actually sitting as arbitrator. I would not be surprised if other institutions adopt the same approach in due course."

I couldn't agree more, although the ICC's innovation comes with an important caveat: the ICC will allow parties to opt out of its arbitrator disclosure in order to respect their "expectations of privacy". It's an interesting reason since the ICC also says that no case reference or party identifying information will be published with the arbitrator information.

Thus, this initiative could distinguish the ICC from all other institutions in the eyes of parties, but only if parties themselves do not thwart its implementation. Hopefully other institutions will view this as the new benchmark and follow with their own arbitrator disclosures (because they should) without permitting parties to easily opt out (because they shouldn't).

Delay = Less Pay

According to the ICC's new guideline, tardy arbitrators could see their fees reduced from 5% to 20% or higher, depending on the length of their delay. This new policy also applies to all cases registered after January 1, 2016.

This innovation has caveats as well. The first is that the ICC Court will only penalize arbitrators when they are “unjustifiably” late. Unquestionably, there are some sources of delay that are outside of a tribunal's control and for which they should not be penalized, such as a request from the parties to delay work on the award because they are attempting settlement. And just as unquestionably, there are some areas where tribunals may claim the delay is justified that is less likely to garner sympathy from parties (“the case is complex”, “the legal issues were difficult”, or “uncooperative co-arbitrator(s)”).

But where the ICC's decision to disclose its arbitrators is automatic (unless the parties opt out) and not subject to the discretion of the arbitrators who make up the ICC Court, that is not the case with the policy on reducing fees for tardiness. As a result, it remains to be seen whether the members of the Court will be strict or lenient in deciding whether a colleague's delay was justified. Of course, “to be seen” is used metaphorically, since there is no indication that decisions on whether to reduce fees will be made public. Presumably, however, parties will now know from their own cases whether they receive a discount on fees when their award arrives months later than expected.

The second caveat is more mechanical, in that the new policy requires tribunals to submit a *draft* award. Under the ICC arbitration rules, drafts are subject to review by the ICC Court. As those who frequently have cases with the ICC know well, the Court does not shy away from sending drafts back to tribunals – sometimes more than once or twice – in order to rectify perceived defects or request improvements in overall quality. Thus, the three (or two) month target is not the timing by which parties should necessarily expect to receive their award.

Despite the caveats, the policy is a welcome innovation. It is bound to encourage arbitrators to issue awards promptly, as it would be imprudent to rely on one's ability to argue later that a delay was justified.

Importantly, the policy seeks to address a well-known source of irritation for parties and their counsel when it occurs. At least parties will not be alone in suffering the costs of delay.

In fact, it somewhat begs the question: don't all arbitration institutions, including the ICC, already take into account unjustifiable delay when calculating arbitrators' fees?

The reality is they don't, but they should.

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